UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

N&W REGISTRY SERVICE, INC.

Employer

and **Case No. 29-RC-9412**

1199 SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Petitioner[1]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Lilliam Perez, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. During the hearing, the Employer's counsel sought to question his witness concerning what the Director of Nursing's (DON's) future involvement in labor relations matters would entail with regard to the bargaining unit of nonprofessional employees that the Petitioner had been recently certified to represent. It appears that the Employer was seeking to eventually develop testimony that in the future, a secretary who works in the DON's office would be acting in a confidential capacity to individuals who formulate and implement

management policies with respect to labor relations. The Petitioner objected and the Hearing Officer sustained the objection. The Employer contends that the Hearing Officer erred by doing so. I find this argument lacking in merit.

The Board treats with caution arguments that employees should be denied the opportunity to participate in its election procedures because an employer plans to change the nature of its operations, or cease operating entirely. Future changes in an employer's operations will not bar an election if the evidence does not establish, with certainty, that these changes will take place. See e.g., Canteberry of Puerto Rico, Inc., 225 NLRB 309 (1976) (Election not barred by employer's claim it was about to cease operations where that assertion was speculative.) Further, evidence that the secretary's job duties might change is not determinative absent evidence that the secretary has actually performed the redefined responsibilities. See L. Suzio Concrete Co., 325 NLRB 392 (1998). (An employee's status remained unchanged notwithstanding the employer's redefining the employee's job description to include supervisory functions, where the employee had not performed the redefined responsibilities.) As will be discussed in further detail later in this Decision, the secretary at issue testified during the hearing that she had never acted in a confidential capacity to individuals involved in formulating and implementing labor relations policies. She had not been called upon to assist the Employer during a recent election campaign nor had she been informed that she would assist the Employer in future contract negotiations. Neither during the hearing nor in its brief did the

[1]The names of the Employer and the Petitioner appear as amended at the hearing.

Employer offer to elicit testimony or other evidence that would show that it had taken affirmative steps to formulate or implement plans to expand the scope of her job duties.

Denying employees the opportunity to participate in the Board's election processes based upon an employer's blanket assertion that it intends to modify their duties so as to remove them from the Act's coverage risks rendering the Board's representation procedures meaningless. Inasmuch as the testimony the Employer sought to introduce in this regard was speculative in nature, I find that the Hearing Officer did not err by disallowing it. Accordingly, I find that the Hearing Officer's rulings made at the hearing are free from prejudicial error, and they hereby are affirmed.

2. The record shows that the Employer, a New York corporation with its principal office and place of business located at 129 South 8th Street, Brooklyn, New York, is engaged in the business of providing personnel services for health care institutions. The record further shows that since on or about August 1, 1999, the Employer has been providing services to Garden Care Center, herein called Garden Care, a nursing home, located in Franklin Square, New York, that began operating at about the same time. The parties stipulated that Garden Care meets the Board's direct standards for the assertion of jurisdiction. They further stipulated that based upon the services the Employer has provided to Garden Care since August 1, 1999, it can be projected that as of August 1, 2000, the Employer will have provided services to that enterprise valued in excess of $50,000.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act. I further find that it is a health care institution within the meaning of Section 2(14) of the Act. Accordingly, it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees.

4. A question affecting commerce exists concerning the representation of certain employees.

5. As earlier noted, since about the time Garden Care opened on July 26, 1999, the Employer has been providing it with personnel services. On December 14, 1999, in Case No. 29-RC-9345, the Petitioner was certified as the collective bargaining representative of the following unit of employees employed by the Employer at Garden Care:

> Included: All full-time and regular part-time certified nurses aides, licensed practical nurses and dietary employees...
>
> Excluded: All other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

In the instant matter, it appears that the Petitioner is seeking an election among the remaining nonprofessional employees employed by the Employer at Garden Care. These employees consist of a nursing secretary, a central supply/medical records clerk and three recreation aides.[2] The Employer

[2] There is no evidence, and neither of the parties asserts, that the Employer employs any additional nonprofessional employees at Garden Care.

contends that the petitioned-for unit is inappropriate. It maintains that a separate residual unit would violate the Board's policy of guarding against undue unit proliferation in the health care industry. It further argues that the nursing secretary should be excluded from the unit as a confidential employee. With regard to the central supply/medical records clerk, it contends that she is an office clerical employee. It goes on to argue that since the certified unit excludes office clerical employees, and that unit is the only appropriate unit, the Petitioner is precluded from representing her.

The Petitioner contends that the unit it seeks to represent is an appropriate residual unit. It maintains that the nursing secretary does not meet the Board's definition of confidential employee. With regard to the central supply/medical records clerk, it appears to argue that Board law does not require that clerical employees at nursing homes be excluded from nonprofessional units. In any event, it maintains that she is not a business office clerical, as that term is defined by the Board.

The Nursing Secretary

Michelle Hasfal, the nursing secretary, shares an office with the Director or Nursing (DON) and the Assistant Director of Nursing (ADON). Her chief responsibility is to draw up nursing schedules so as to assure that there is adequate coverage throughout the day. The nursing home operates on three shifts and Hasfal sees to it that each shift is staffed by at least 7 certified nurses aides, 2 to 3 licensed practical nurses, and a registered nurse. Although she

schedules employees, there is no evidence that she can compel an employee to work a shift against his or her will. Each day, Hasfal checks the floors to make sure they are adequately staffed. If an employee does not appear for work as scheduled, she informs the DON. However, there is no evidence that she has ever recommended that employees be disciplined for absenteeism or lateness.

Hasfal's other main responsibility is to arrange for transportation for residents leaving the nursing home and to assure that each resident is accompanied by at least one staff member during his or her trip.

Hasfal testified that she does not have access to personnel files or disciplinary records and has never been called into disciplinary meetings. Nor does she act as the DON's personal secretary. She asserted that the one occasion she reviewed personnel files was shortly after the facility opened when she was directed to examine them and record what languages the various staff members spoke. Although Michael Tartaglia, Garden Care's Administrator, contended that the scheduling of employees requires knowledge as to which employees are unable to work due to suspensions or other discipline, Hasfal denied involvement in any disciplinary matters, and Tartaglia admitted he had never actually seen her typing any disciplinary memos. Tartaglia also maintained that Hasfal had investigated a case involving patient abuse, taking statements from witnesses. However, he based this assertion on circumstantial evidence (i.e., he was told that she *would* take statements and he later saw her making copies of statements). Hasfal denied taking part in any such investigation. She admitted, however, that shortly before the Christmas

holidays, she typed a memo to nursing personnel regarding Garden Care's policy concerning absenteeism during the holidays. It appears that this memo was posted. However, it was not submitted into evidence. Hasfal testified that she suggested that such a memo be prepared in order to ease the strain of her scheduling work during this period.

In its brief, the Employer's counsel "states for the record that once the Union comes on board" Hasfal will be deeply involved in all labor management issues including "taking minutes of labor related meetings" and participating in grievance hearings. However, the Petitioner has been the certified representative of the above described unit since December 14, and, as earlier noted, there is no evidence that the Employer utilized her services during the earlier election campaign or that it has requested her assistance to prepare for future negotiations.

Hasfal works a 7 hour day and is paid an hourly wage of $11.00. She does not currently enjoy any fringe benefits.

The Central Supply/Medical Records Clerk

The responsibilities of Julie Mathews, the Central Supply/Medical Records clerk, are threefold. Each morning, she visits the floors, checking each floor's supply of medication, gloves, trays and related items. For those floors that are short of certain supplies, she retrieves the needed items and delivers them to the floor. If the supply of a given item is running low, she informs the DON and faxes a purchase order to the supplier. For an hour each day, Mathews covers for the receptionist during her lunch break. In the afternoon,

she reviews the charts of recently discharged residents to assure that they contain the proper signatures. If a signature is missing, she brings it to the attention of the staff member involved and has him or her sign the chart. She subsequently files the chart in the medical records area in the basement. Mathews does not share an office or come into contact with any other clerical employees. Like Hasfal, she is supervised by the DON, and she estimated that she spent approximately 75% of her time working as a central supply clerk.

She is paid $10.00 per hour and does not receive any fringe benefits.

The Recreation Aides

The Employer employs three recreation aides at Garden Care. The recreation aides provide the residents with various recreational activities, both on a group and a one on one basis. Unlike the nursing secretary and the central supply/medical records clerk, the recreation aides spend virtually all their time caring for patients. Wanda Gilliam, the recreation aide who testified at the hearing, is paid an hourly wage of $8.50 and, like the other two employees the Petitioner seeks to represent, does not enjoy any fringe benefits.

Discussion

As earlier noted, the Employer contends that an election among the employees in the petitioned-for unit would result in a proliferation of units at the Garden Care facility. It further appears to argue that inasmuch as the certified unit excludes office clerical employees, the Petitioner is precluded from seeking to represent them at this time. I find both arguments lacking in merit.

With regard to the former, the Board has held that where an incumbent union seeks to represent a residual grouping of employees, it must do so by adding them to the unit it currently represents rather than representing them in a separate unit. St. John's Hospital, 307 NLRB 767, 768 (1992). The unit in which such an election is directed must contain all the employees the Board deems necessary to "perfect" the existing unit. Mary Thompson Hospital, 242 NLRB 440, 441 (1979). In the instant matter, neither the Employer nor the Petitioner contend that the petitioned-for unit does not consist of all the unrepresented employees employed by the Employer at the Garden Care facility. Since the employees the Petitioner seeks to represent can be added to the existing unit if the Petitioner prevails, an election among such a grouping of employees would not result in unit proliferation.

With regard to the Employer's contention that the exclusion of office clerical employees from the certified unit precludes the Petitioner from seeking to represent them at this time, in The Budd Company,[3] the employer therein made a similar argument. The employer contended that inasmuch as the unit description in an earlier Consent Election Agreement excluded the employees the union therein was seeking to represent in its petition, the union had agreed not to seek to represent such employees in the future. The Board rejected that argument and reaffirmed its earlier holding, set forth in Cessna Aircraft,[4] that an agreement to refrain from seeking to represent employees would only bar an

[3] 154 NLRB 421, 422-423 (1965).

[4] 123 NLRB 855 (1959). See Briggs Indiana Corporation, 63 NLRB 1270 (1959).

election if that agreement came in the form of an express promise. The Board, in Lexington House, 328 NLRB No. 124 (1999) has since clarified Cessna to state that such a promise does not have to appear in a collective bargaining agreement. The Certification of Representative in Case No. 29-RC-9345 contains no such promise, and there is no evidence that the Petitioner ever assured the Employer that it would not seek to represent additional employees. Accordingly, I find that the Petitioner is not foreclosed from seeking to represent clerical employees.

To the extent that the Employer may also be arguing that clerical employees should not be included in the same unit as other nonprofessionals, in Health Care Industries, 284 NLRB 1528, 1597 (1988), the Board stated that with certain exceptions, eight different units would constitute the only appropriate units at acute care hospitals. Among these units was a unit of all nonprofessional employees "*except for* technical employees, skilled maintenance employees, business office clerical employees and guards." However, as the Board stressed in Health Care Industries, these rules only apply to acute care hospitals. In Park Manor Care Center, 305 NLRB 872 (1991) the Board stated that it would utilize an empirical community of interest test when determining appropriate units at nursing homes. Moreover, even during rulemaking, the Board stressed that the exclusion of clerical employees from nonprofessional units would be restricted to business office clericals, i.e. those employees responsible for a hospital's "billing and financial practices". Health Care Industries, supra at 1562. Since Park Manor the Board has

included clerical employees in nonprofessional units. See Lincoln Park Nursing Home, 318 NLRB 1160, 1163-1165 (1995); Hillhaven Convalescent Center, 318 NLRB 1017, fn. 1 (1995) (central supply clerks, medical records clerks and receptionists included in a nonprofessional unit.) Thus, with regard to the arguably clerical employees, not only does Board policy require that such residual employees be included in the existing unit if they select representation, past precedent supports the appropriateness of units of nonprofessional employees that include clericals. Moreover, creating a separate unit of one or two clerical employees (the nursing secretary and/or the central supply/medical records clerk) would result in unit proliferation and create an "impractically small" unit of clerical employees. Lifeline Mobile Medics, Inc. 308 NLRB 1068 (1992) (Two clerical employees included in a unit of EMTs employed by an ambulance service.) Insofar as the Employer *may* be contending that just one of the clerical employees should be excluded from the unit, inasmuch as the Board does not certify one person units,[5] excluding a single employee from the unit would preclude that employee from obtaining representation in the future.

In view of the above, I am directing a self determination election to allow the nursing secretary, the central supply/medical records clerk and the recreation aides to determine whether they wish to be included in the overall nonprofessional unit represented by the Petitioner or whether they wish to remain unrepresented.

In doing so, I am rejecting the Employer's contention that the nursing secretary should be excluded as a confidential employee. Because many

[5] Roman Catholic Orphan Asylum, 229 NLRB 251 (1977).

employees arguably have access to "confidential" information, and a finding of confidential status would deny them the opportunity to obtain representation, the Board construes confidential status narrowly. Inland Steel Company, 308 NLRB 868, 872 (1992). Thus, the Board excludes as confidential only those employees who act in a confidential capacity to individuals who determine, formulate and effectuate policies in the area of labor relations. B.F. Goodrich Co., 115 NLRB 722 (1956); NLRB v. Hendricks County Electric Corp., 454 U.S. 170, 108 LRRM 3105 (1981). Mere access to personnel files or the knowledge as to which employees are being disciplined is insufficient to confer confidential status. PTI Communications, 308 NLRB 918, 922 (1992); Lincoln Park Nursing Home, supra at 1163-1164. In the instant case, there is no evidence that the DON has heretofore performed any work in the area of labor relations, and Hasfal denied that she acts as the DOL's secretary. Rather, she asserted that her duties were by and large restricted to scheduling employees and arranging for transportation for residents leaving the facility. With regard to the Employer's declaration, in its brief, that Hasfal's future responsibilities will include assisting the Employer in "all labor related issues," I reject this argument for the same reasons I have found that the Hearing Officer did not commit prejudicial error by precluding such testimony.

Accordingly, I will direct an election among the employees in the following voting group:

> All full-time and regular part-time recreation aides, central/supply medical records clerks and nursing secretary employed by the Employer at Garden Care Center excluding all employees currently represented by 1199 Service Employees

International Union, AFL-CIO, guards and supervisors as defined in the Act.

If a majority of eligible voters cast their ballots for the Petitioner, they will be taken to have indicated a desire to be included in the unit of nonprofessional employees currently represented by the Petitioner. If a majority of eligible voters cast their ballots against the Petitioner, they will be taken to have indicated their desire to remain unrepresented.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an

economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by 1199 Service Employees International Union, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the issuance of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before February 9, 2000. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by February 16, 2000.

Dated at Brooklyn, New York, this 2nd day of February, 2000.

/S/ ALVIN BLYER

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